UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

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Mr. Dave Frohnmayer
Attorney General
Justice Building
Salem, Oregon 97310

Dear Dave:

It was a pleasure to meet with you and other Attorneys General from the Western States in Sedona, Arizona on July 27 to discuss the conduct of federal environmental programs in Indian Country. I left the meeting feeling that our discussion and the many discussions among state, tribal and federal representatives that preceeded it in the last several months have substantially increased our mutual understanding of the issues and have set the stage for further cooperation. As Chair of the Indian Affairs Working Group of the National Association of Attorneys General, you deserve to be complimented for raising the issues and for bringing tribal, state and federal leaders together to discuss them in such a constructive fashion.

For your information, I am enclosing with this letter a copy of a letter recently sent by Lee Thomas as EPA Administrator to Chief Wilma ManKiller and other tribal leaders. In that letter, Mr. Thomas reaffirms, as I did in Sedona, EPA's commitment to implementing its 1984 Indian Policy. That policy rests on a determination to work with the tribes on a government-to-government basis in reservation environmental matters. I was pleased to receive from you NAAG's recent Resolution Regarding State/Tribal Relations, which expressed a similar determination.

Let me turn now to the specific questions you asked in your July 15 letter to Mr. Thomas and put into writing the answers I gave you in our discussions in Sedona.

Question 1 - For those federal environmental programs where Congress has not specifically authorized EPA to treat Indian tribes as states, who may implement those programs within reservations?

This question raises as a matter of a law what has always been a very difficult issue - i.e., locating the exact demarcation line between state and tribal jurisdiction in Indian Country. Like you and many tribal leaders, I agree that we should avoid having to finally decide that issue whenever possible. One way to do that in the administration of environmental programs is to structure the tribal/state/federal relationship through cooperative agreements which acknowledge but do not decide the ultimate jurisdictional issues. Such agreements can take into account the wide variety of circumstances from reservation to reservation and spell out the precise intergovernmental relationship which will insure that reservation environments are properly protected.

The 1984 Indian Policy strongly encourages the negotiation and use of such agreements and EPA has already undertaken agreements with both tribes and states. For instance, the Colville Tribe has concluded agreements with both EPA and the State of Washington regarding water quality management on the reservation (53 FR 26968). There are several other situations where such agreements have been developed.

In the absence of a cooperative agreement, we have the following views on who, as a matter of law, may implement federal environmental programs on Indian reservations. First, EPA clearly has the authority to administer its own statutory programs in Indian Country with respect to Indians and non-Indians alike. In fact, EPA is currently doing so in close consultation with the affected Tribes on several reservations. In the absence of express statutory authority, EPA has the authority and obligation to implement environmental laws ocean-to-ocean. (See, e.g., Phillips Petroleum Co. v. EPA, 803 F.2d 545, 553 (10th Cir. 1986)).

Second, whether a state may administer the federal environmental programs on Indian reservations will depend on whether the state can adequately demonstrate its jurisdiction to do so, as a matter of state and federal law. A state applying for primacy on Indian lands must include in its application to EPA an analysis by the state's attorney general of the state's authority to regulate on Indian lands. See, e.g., 40 CFR 123.23(b).

The State of Washington recently made such an application for primacy in the Underground Injection Control program under the Safe Drinking Water Act. EPA will soon issue a notice detailing its decision not to authorize Washington to administer its UIC program on Indian lands. This document will serve as an example of how EPA analyzes state claims of jurisdiction on Indian lands in accordance with applicable principles of federal environmental and Indian law. See Washington Department of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985); California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083 (1987).

Finally, in the absence of express statutory authorization to treat a tribe as a state, EPA may nonetheless authorize a tribe to administer federal environmental programs on the reservation. In several instances, EPA has found implicit authority in its statutes silent on the status of Indian tribes to authorize tribal participation in the development and operation of federal programs. See, e.g., Nance v. EPA, 645 F.2d 701 (9th Cir. 1981) (PSD program); Phillips Petroleum, supra (UIC program). Whether the authorization is express or implicit, EPA will require tribes, like states, to adequately demonstrate their jurisdiction before authorizing them to administer their environmental programs in lieu of the federal program.

Question 2 - In evaluating whether tribal and state applications for delegation of a federal environmental program are equivalent to the federal program, will EPA subject the tribal and state programs to the same public participation and procedural due process requirements?

Yes. The same public participation and procedural due process requirements that apply to states operating federal environmental ~~programs as set~~ out in 40 CFR Part 124, will apply to tribes. See 52 FR 28114.

Question - 3 - Where conflicts arise as a result of the implementation or enforcement of EPA-approved tribal and state programs, what procedures will be established to resolve the conflicts? What can EPA do to encourage negotiated resolution of state-tribal implementation and enforcement conflicts?

In general, the existing procedures under the various environmental statutes for considering state/state conflicts will be applied as well to state/tribal conflicts. (See, e.g., Clean Air Act section 126, Clean Water Act section 401(a)(1)).

In addition, section 518(e) directs EPA in consultation with the tribes and states to "provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water-quality standards that may be set by States and Indian tribes located on common bodies of water." EPA is planning this fall to circulate a draft of a regulation which would establish such a mechanism for both tribes and states. As you know, both state and tribal representatives have participated in the workgroup efforts on this regulation.

Question 4 - What role does the trust relationship that the federal government has with Indian tribes play in the administration and implementation of federal environmental programs?

EPA's responsibilities towards Indian tribes are defined by the statutes it administers. Generally speaking, those statutes require EPA to insure that the federal environmental programs are implemented and enforced in a manner that will satisfy the statutory goals of protecting public health and the environment. The 1984 Indian Policy sets forth the broad principles that will guide EPA's efforts to meet its responsibilities on Indian lands in accordance with the federal environmental statutes and any trust obligations owed to the tribes.

Where EPA has a statutory role to play in resolving tribal/state environmental disputes, such as under section 518(e)(2) of the Clean Water Act, EPA will seek to resolve those disputes in a manner consistent with applicable statutory criteria and with the goals and purposes of the statute.

Question 5 - Where an Indian tribe has not yet applied for or been delegated primacy for the federal water quality standards program or has not yet promulgated regulations establishing water quality standards, what standards will apply within that reservation and who will have the authority to enforce those standards?

If states have established water quality standards that purport to apply to Indian reservations, we will assume without deciding that those standards remain applicable until a tribe is authorized to establish its own standards or until EPA otherwise determines in consultation with a state and tribe that the state lacks jurisdiction to establish water quality standards on Indian lands. EPA believes this will best ensure that reservation waters are adequately protected in the interim period. If states now desire to establish standards for Indian reservations, we will review their jurisdiction to do so when

we review the standards (See Answer to Question # 1). In the absence of applicable state or tribal standards, when necessary, EPA will promulgate federal standards.

Question 6 - Until an Indian tribe has been delegated authority to carry out the NPDES program, who will issue and enforce NPDES permits for facilities located within that reservation? What is the current status of existing NPDES permits issued to such facilities by a state-administered NPDES program? Once a tribe assumes primacy over the NPDES program, how will existing NPDES permits be treated?

EPA is aware that some states have issued NPDES permits to certain dischargers on reservation lands. Until the NPDES program is delegated to a tribe, or until EPA otherwise determines in consultation with a state and tribe that a state lacks jurisdiction to issue NPDES permits on Indian lands, we will assume without deciding that those permits contain applicable effluent limits, in order to ensure that controls on discharges to reservation waters remain in place. Where a state has not issued NPDES permits on Indian lands, EPA will continue to do so. How existing permits will be treated when a tribe assumes primacy for the NPDES program will be addressed in the Indian NPDES regulations of which EPA is planning to circulate a draft this fall.

Question 7 - In the event an Indian tribe determines that it will not apply for delegation of a particular program, who may carry out that program within that reservation? Will deadlines be established for Indian tribes to elect whether they will apply for delegation?

The answer to this question essentially is the same as for question 1. We have no plans to establish deadlines for tribes to seek primacy.

I hope these answers are helpful. I look forward to working with you, other Attorneys General and state representatives, and tribal leaders as EPA pursues its efforts to protect reservation environments.

Sincerely,

Larry Jensen

Lawrence J. Jensen
General Counsel

Enclosure

cc: All CWAG Attorneys General
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